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KEATING DENTAL ARTS, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

JAMES R. GLIDEWELL DENTAL
CERAMICS, INC. dba GLIDEWELL
LABORATORIES,
Plaintiff,
v.
KEATING DENTAL ARTS, INC.
Defendant.
AND RELATED COUNTERCLAIMS.

Civil Action No.
SACV11-01309-DOC(ANx)
Honorable David O. Carter
**DEFENDANT AND
COUNTER-PLAINTIFF
KEATING DENTAL ARTS,
INC.'S NOTICE OF MOTION
AND MOTION IN LIMINE
TO EXCLUDE TESTIMONY
OF DAVID J. FRANKLYN
(MOTION IN LIMINE NO. 1)**
Trial Date: February 26, 2013
Time: 8:30 a.m.
Location: Courtroom 9D

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1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on February 26, 2013, at 8:30 a.m., or
3 as soon thereafter as the matter may be heard by the Honorable David O. Carter
4 of the United States District Court for the Central District of California,
5 Southern Division, at 411 West Fourth Street, Courtroom 9D, Santa Ana, CA,
6 92701, Defendant and Counter-Plaintiff Keating Dental Arts, Inc. (“Keating” or
7 “Defendant”) will move and hereby does move for an order excluding from trial
8 testimony from Plaintiff and Counter-Defendant James R. Glidewell Dental
9 Ceramics, Inc.’s (“Glidewell”) expert witness David J. Franklyn (“Franklyn”) in
10 its entirety, or, in the alternative, an order excluding from trial any evidence or
11 argument relating to, or introduced by, Franklyn’s untimely Report in Response
12 to Defendant’s Rebuttal Expert Lori Boatright (Docket No. 125-14); (2) Report
13 in Response to Defendant’s Dental Industry Expert Dr. David Eggleston (Docket
14 No. 125-13); and (3) Franklyn’s Declaration in Support of Glidewell’s
15 Summary Judgment Motion (Docket No. 90-1, Exhibit N at pp. 111-131).

16 This motion is based upon this Notice, the accompanying Memorandum
17 of Points and Authorities, all pleadings, papers, and records on file in this
18 action, all matters of which the Court may take judicial notice, and such further
19 written and oral argument as may be presented to the Court.

20 Respectfully submitted,

21 KNOBBE, MARTENS, OLSON & BEAR, LLP

22 Dated: January 17, 2013

By: /s/ David G. Jankowski
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KEATING DENTAL ARTS, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant and Counter-Plaintiff Keating Dental Arts, Inc. (“Keating” or “Defendant”) hereby moves for an order *in limine* to exclude from trial any testimony from Plaintiff and Counter-Defendant James R. Glidewell Dental Ceramics, Inc.’s (“Glidewell”) expert witness David J. Franklyn (“Franklyn”). As he admitted in his deposition, Franklyn is not a qualified expert on trademark practices. Even if he were a qualified expert, his opinions are based on unreliable principles and methods. Furthermore, Franklyn’s legal opinions are inadmissible under well-settled law. Thus, Franklyn’s testimony should be excluded as improper expert testimony pursuant to Federal Rule of Evidence (“F.R.E.”) 702. Moreover, Franklyn’s unqualified opinion testimony should also be excluded pursuant to F.R.E. 403 because it is a waste of the Court’s time and unfairly prejudices Keating.

However, if the Court declines to exclude Franklyn’s testimony in its entirety, then Keating moves, in the alternative, for an order excluding any evidence or argument relating to the testimony of Franklyn that Glidewell introduced after the discovery cut-off date, including, but not limited to, (1) Franklyn’s Report in response to Defendant’s Rebuttal Expert Lori Boatright (“Franklyn’s Rebuttal to Boatright”); (2) Franklyn’s Rebuttal Report in response to Defendant’s Dental Industry Expert Dr. David Eggleston (“Franklyn’s Rebuttal to Eggleston”) (collectively, the “Franklyn Rebuttal Reports”); and (3) Franklyn’s Declaration in Support of Glidewell’s Motions for Summary Judgment (“Franklyn Declaration”) (Docket No. 90, Ex. N.). The Franklyn Rebuttal Reports and the Franklyn Declaration were untimely served. Thus, any evidence or argument relating to, or introduced by, the Franklyn Rebuttal Reports or the Franklyn Declaration should be excluded from trial pursuant to Federal Rule of Civil Procedure (“F.R.C.P.”) 37(c)(1).

II. RELEVANT BACKGROUND

Pursuant to the Rule 26(f) Joint Report filed with the Court (Docket No. 11), the date for exchange of opening expert reports was September 15, 2012 and the date for exchange of rebuttal expert reports was October 15, 2012.

On or about September 15, 2012, the parties exchanged their expert reports. Specifically, Glidewell submitted the expert report of Franklyn (“Franklyn’s Expert Report”) (Docket No. 125-12.) and Keating submitted the expert reports of Lori Boatright and Dr. David Eggleston. Franklyn’s Expert Report was the only expert report timely served by Glidewell. In his report, Franklyn claims he was retained by Glidewell to render opinions as to whether: “(1) Plaintiff’s registered mark BruxZir is predominantly seen as the generic name for the service of making solid zirconia dental crowns and bridges, or for the material from which those crowns and/or bridges are made, by relevant consumers in the relevant markets or submarkets in the United States; (2) whether Plaintiff’s registered trademark BruxZir is a strong mark in the relevant markets in which Plaintiff uses it; (3) whether there is a close overlap between the markets in which Plaintiff uses its BruxZir mark and the markets in which the Defendant uses its KDZ Bruxer mark; (4) whether the Defendant’s mark, KDZ Bruxer, is likely to cause relevant consumers in the relevant markets to be confused as to its possible affiliation with Plaintiff’s registered mark BruxZir.” (*Id.* ¶3.)

Keating took Franklyn's deposition on October 12, 2012. (Docket No. 125-16.) In his deposition, Franklyn stated his experience in the trademark field was limited to academia and consulting work. (*Id.* at 13:1-8; 14-23:20; 25:1-5.)

Thereafter, on the discovery cut-off date, October 29, 2012, shortly before midnight, Glidewell served the Franklyn Rebuttal Reports on Keating's counsel. The date for exchange of expert rebuttal reports was October 15, 2012, as stated in the Rule 26(f) Joint Report filed with the Court (Docket No. 11). In other

1 words, the Franklyn Rebuttal Reports were two weeks late, and after the Court-
 2 ordered cutoff date for commencing depositions.

3 On October 29, 2012, Glidewell filed an “*Ex Parte* Application to Amend
 4 Scheduling Order” to extend discovery deadlines. (Docket No. 69.) However,
 5 the Court denied Glidewell’s *Ex Parte* Application to Amend Scheduling Order
 6 on November 9, 2012 and refused to extend the discovery or expert disclosure
 7 deadlines. (Docket No. 74.)

8 Nevertheless, on November 19, 2012, Glidewell submitted the Franklyn
 9 Declaration in support of its summary judgment motions filed that same day.
 10 (Docket No. 90-1, Exhibit N at pp. 111-131.) The Franklyn Declaration
 11 improperly relied on the content of Franklyn’s untimely Rebuttal Reports.

12 In his Rebuttal Reports and Declaration, Franklyn claims to have
 13 interviewed ten new dentist witnesses¹ regarding their perception of the BruxZir
 14 mark. (*Id.* at ¶¶ 55-67.) Glidewell did not disclose any of those witnesses or
 15 evidence during the discovery period. Franklyn did not disclose any of those
 16 witnesses or evidence in his initial expert report served September 15, 2012, or
 17 in his deposition on October 12, 2012. Indeed, during his deposition, *Franklyn*
 18 *repeatedly testified that he had never spoken to a dentist for this case.* By way
 19 of example, he testified:

20 A: We’ve already established, Ms. Symes [sic], that I have not spoken to
 21 any dentists about anything other than my own teeth and my own bruxer
 22 crown."

23 (Docket No. 125-16 at 133:6-8.)

24 On November 26, 2012, Glidewell filed a Supplemental Appendix of
 25 Evidence in Support of its Oppositions to Keating’s Motions for Summary
 26 Judgment (Docket No. 116), containing a Supplemental Declaration of Franklyn
 27

28 ¹ The alleged statements of these dentists are inadmissible hearsay pursuant to
 F.R.E. 801 and 802.

1 that seeks to reintroduce the same evidence first proffered in Franklyn's
2 untimely Rebuttal Reports and Declaration. (*Id.*, Exhibit T.) Thus, the
3 information contained in the Franklyn Supplemental Declaration is likewise
4 inadmissible.

5 Overall, Franklyn's testimony is entirely improper and should be
6 excluded. Not only is it introduced as "surprise" evidence, well beyond the
7 deadlines set by the Court, it is directly contrary to Franklyn's prior testimony.

8 **III. FRANKLYN'S TESTIMONY SHOULD BE EXCLUDED ENTIRELY**

9 "A witness who is qualified as an expert by knowledge, skill, experience,
10 training, or education may testify in the form of an opinion or otherwise if:

11 (a) the expert's scientific, technical, or other specialized
12 knowledge will help the trier of fact to understand the
13 evidence or to determine a fact in issue;
14 (b) the testimony is based on sufficient facts or data;
15 (c) the testimony is the product of reliable principles and
16 methods; and
17 (d) the expert has reliably applied the principles and methods
18 to the facts of the case."

19 F.R.E. 702.

20 Franklyn is not qualified as "an expert by knowledge, skill, experience,
21 training, or education." Accordingly, his expert testimony should be excluded
22 from trial in its entirety. Moreover, even if he was a qualified expert (and he is
23 not), his testimony is not the product of "reliable principles and methods."
24 Furthermore, his testimony is plagued with improper legal opinions. Each of

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1 these failings is a sufficient independent ground to exclude Franklyn's
 2 testimony in its entirety pursuant to F.R.E 701² and 702.

3 **A. Not a Qualified Trademark Practitioner or Dental Expert**

4 A trademark lawyer is admissible as an expert only to discuss questions
 5 of fact, such as the practical issues regarding trademark prosecution. Franklyn
 6 is not a trademark practitioner. (Docket No. 125-16 (Franklyn Dep. Tr.) 44:3-
 7 5.) Franklyn admitted he doesn't file trademarks, although he "may have filed a
 8 trademark application" in one case. (*Id.* at 43:14-17.) He has never litigated or
 9 prosecuted a trademark. (*Id.* at 43:10-11, 12:18-13:4.) When asked whether he
 10 routinely conducts trademark searches, Franklyn evaded a direct answer, finally
 11 stating, "I said that they are routinely conducted. I didn't say they are conducted
 12 by me." (*Id.* at 55:16, 21-22.) He ultimately admitted he does not conduct
 13 trademark searches regularly. (*Id.* at 56:1-22; 57:1.) Franklyn's experience in
 14 the trademark field is limited to academia and consulting work. (*Id.* at 13:1-8;
 15 14-23:20; 25:1-5.)

16 Under F.R.E 702, only qualified experts may submit testimony to assist
 17 the trier of fact. Given Franklyn's insufficient experience as a trademark
 18 practitioner, he is not a qualified expert on trademark practices, and his
 19 testimony should be excluded in its entirety. *See United States v. Sayre*, 434 F.
 20 Appx 622, 624 (9th Cir. 2011) cert. denied, 132 S. Ct. 353, 181 L. Ed. 2d 223
 21 (2011) (affirming trial court's exclusion of testimony from a party's expert
 22 witness because the "expert told the court that he based his testimony on his
 23 "experience as a teacher and as someone working in this field" and "[w]hen the
 24 court asked whether the expert had relied upon any empirical data or any
 25 methodology, he repeated that he was 'relying on [his] knowledge and

26 ² If a witness is not testifying as an expert, opinion testimony must be
 27 "rationally based on the witness' perception." Fed. R. Evid. 701. Here,
 28 Franklyn is not a qualified expert, thus his lay opinion is improper in that it is
 not "rationally based on [his] perception," but on his independent research and
 readings.

1 experience.’ The district court correctly applied Federal Rule of Evidence 702 in
 2 excluding [the] testimony” (second alteration in original)); *see also Gable*
 3 *v. Nat'l Broad. Co., Inc.*, 438 F. Appx 587, 589 (9th Cir. 2011) (affirming trial
 4 court’s exclusion of “expert testimony from David Nimmer and Eric Sherman”
 5 in a copyright infringement suit because “[s]ome of Nimmer’s testimony
 6 contained inadmissible legal conclusions” and “although each were recognized
 7 to have a separate area of expertise, both Nimmer and Sherman also failed to
 8 establish that they had ‘knowledge, skill, experience, training, or education’
 9 *relevant to the evidence at issue*” (quoting F.R.E. 702) (emphasis added));
 10 *Charter Nat'l Bank & Trust v. Charter One Fin., Inc.*, No. 01 C 0905, 2001 WL
 11 1035721 at *6 (N.D. Ill. Sept. 4, 2001) (disqualifying trademark “expert”
 12 finding that practical experience such as drafting an application, and defending
 13 or prosecuting a trademark are relevant experiences, but teaching, academia, and
 14 being well read in the field are insufficient).

15 Franklyn also offers opinion statements about dental industry norms and
 16 practices. (Docket No. 125-12 (Franklyn Expert Report) ¶ 16; Docket No. 125-
 17 14 (Franklyn’s Rebuttal to Boatright) ¶ 23; Docket No. 125-13 (Franklyn’s
 18 Rebuttal to Eggleston) ¶ 43; and Docket No. 125-16 (Franklyn Dep. Tr.) 44:19.)
 19 He opines as to the perspectives of “people in the relevant market.” However,
 20 he has admitted that he has no experience whatsoever in the dental field (Docket
 21 No. 125-16 (Franklyn Dep. Tr.) 11:11-12:17) and that he hasn’t consulted with
 22 dental professionals. (*Id.* at 9:15-22, 10:1, 133:6-8.) His only experience with
 23 dental crowns is his “personal experience” as a dental patient, his conversations,
 24 and his Internet reading in preparation for this case. (*Id.* at 27:21-28:15.) This
 25 is patently insufficient to qualify him as a dental expert. *See* F.R.E. 702.
 26 Therefore, Franklyn’s statements relating to the dental industry lack foundation
 27 and should be excluded.

28 / / /

1 Likewise, Franklyn cannot be admitted as a trademark survey expert. He
 2 admitted he had not spoken with or surveyed any dental professionals and that
 3 he did not have any such survey reports conducted by Glidewell. ((Docket No.
 4 125-16 (Franklyn Dep. Tr.) 133:6-8, 16-21.) Furthermore, Glidewell has not
 5 laid any foundation establishing Franklyn as a proper survey expert.

6 Accordingly, this Court should exclude Franklyn's testimony in its
 7 entirety, not only under F.R.E. 701 and 702 as improper expert testimony/lay
 8 opinion, but also under F.R.E. 403³ as unfairly prejudicial to Keating and as a
 9 waste of the Court's time.

10 **B. Franklyn's Methodology Is Not The Product Of Reliable Principles**
 11 **And Methods**

12 Even if Franklyn is considered a proper expert (and he is not), his
 13 testimony would run afoul of F.R.E. 702 for using unreliable principles and
 14 methods. Franklyn is not a professional survey expert. He offers no such
 15 qualifications in his declaration, reports or curriculum vitae. Franklyn even
 16 contradicts the validity of his own methodology. In his deposition, Franklyn
 17 confirmed that, to be considered generic, a term does not need to appear in the
 18 lists of goods of third party marks revealed in PTO application and registration
 19 searches. (Docket No. 125-16 (Franklyn Dep. Tr.) 42:9-12.) But in his Expert
 20 Report, Franklyn relied solely on a PTO search and a brief online search to
 21 make a determination that BruxZir is not generic. (Docket No. 125-12
 22 (Franklyn Expert Report) ¶¶ 6-7.) The basis for his determination was that if
 23 “‘bruxzir’ had become generic for zirconia crown or bridge, one would expect
 24 for the term ‘bruxing’ to be observed in the goods and services description...”
 25 of a PTO search. (*Id.* ¶ 6(d)(3).) This methodology is analytically incorrect. A

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³ “The court may exclude relevant evidence if its probative value is
 28 substantially outweighed by a danger of one or more of the following: unfair
 prejudice, confusing the issues, misleading the jury, undue delay, wasting time,
 or needlessly presenting cumulative evidence.” F.R.E. 403.

1 finding of generic-ness has nothing to do with being included in a trademark
 2 goods and services description. The word must be assessed as it is understood
 3 by the relevant consumer—dentists. There is no foundation for Franklyn's
 4 statement in trademark law, and Franklyn himself admitted in his deposition that
 5 there is no basis for his statement. (Docket No. 125-16.)

6 Additionally, Franklyn uses severely unreliable methods in conducting
 7 the dentist witness interviews he relies upon in the Franklyn Rebuttal Reports
 8 and Declaration. In addition to being untimely disclosed, this survey evidence
 9 was improperly obtained. To be admissible, the survey must be conducted
 10 according to accepted principles. *Clicks Billiards, Inc. v. Sixshooters Inc.*, 251
 11 F.3d 1252, 1263, (9th Cir. 2001) (citations omitted). The questions posed by
 12 Franklyn, and the circumstances under which he posed them, were so suggestive
 13 as to render the entire survey so severely flawed and unreliable that it should be
 14 excluded.

15 Franklyn consulted only dentists affiliated with Glidewell. (Docket No.
 16 125-14 (Franklyn Rebuttal to Boatright) ¶¶ 12-19 and Docket No. 125-13
 17 (Franklyn Rebuttal to Eggleston) ¶¶ 30-41.) His questions were also improperly
 18 eliciting legal opinions from lay witnesses. (Docket No. 125-14 (Franklyn
 19 Rebuttal to Boatright) ¶¶ 14, 17, 19-21; Docket No. 125-13 (Franklyn's Rebuttal
 20 to Eggleston) ¶¶ 32, 37, 39-41.) One dentist surveyed stated, "BruxZir is not a
 21 generic name." (Docket No. 125-14 (Franklyn Rebuttal to Boatright) ¶ 14 and
 22 Docket No. 125-13 (Franklyn's Rebuttal to Eggleston) ¶ 32.) That is a legal
 23 question at issue in the case, and inappropriate as a survey question. Franklyn
 24 does not qualify as a survey expert.

25 Moreover, the survey was so informal that it fails key tests of
 26 professionalism and reliability, and it should be excluded from evidence. See 6
 27 McCarthy on Trademarks and Unfair Competition § 32:158 at 32-341 (4th ed.)
 28 (citing *M2 Software, Inc. v. Madacy Entm't*, 421 F.3d 1073, 1087 (9th Cir.

1 2005) (“Both district judges properly rejected the M2 Software’s survey because
 2 the survey’s creator ‘did not qualify as an expert on designing or analyzing
 3 consumer surveys.’”); *Hodgdon Powder Co. v. Alliant Techsystems, Inc.*, 512 F.
 4 Supp. 2d 1178, 1182 (D. Kan. 2007) (deeming “untrustworthy and
 5 inadmissible” a survey distributed by plaintiff’s employees from their booth at a
 6 trade show and designed without input of a professional survey person).
 7 Accordingly, Franklyn’s testimony should be excluded on this ground alone.

8 **C. Franklyn’s Testimony Is Plagued With Inadmissible Legal**
 9 **Conclusions**

10 Bona fide experts may not offer legal opinions or arguments. *United*
 11 *States v. Brodie*, 858 F.2d 492, 497 (9th Cir. 1988). “Resolving doubtful
 12 questions of law is the distinct and exclusive province of the trial judge.” *Id.* at
 13 497 (affirming trial court’s exclusion of expert testimony regarding the law of
 14 trusts), overruled on other grounds. As a result, legal opinion evidence falls
 15 outside the parameters of permissible expert testimony. *See Mukhtar v.*
 16 *California State Univ., Hayward*, 299 F.3d 1053, 1066 n. 10 (9th Cir. 2002)
 17 (“an expert witness cannot give an opinion as to her legal conclusion”); *see also*
 18 F.R.E. 704(a). Similarly, an expert may not testify as to any legal conclusions
 19 drawn from applying law to facts. *Nationwide Transp. Fin. v. Cass Info. Sys.,*
 20 *Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008).

21 Relying on these black-letter principles, courts in this Circuit have
 22 rejected attempts to offer “experts” in the related field of copyright law. *See*
 23 *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV 99-07654 HLH (VBKx), 2003
 24 WL 25781901, at *1 (C.D. Cal. Feb. 10, 2003) (granting motion to exclude law
 25 professor’s expert testimony on whether website content was subject to
 26 copyright protection and whether copying of that content constituted “fair use”);
 27 *Jonathan Browning, Inc. v. Venetian Casino Resort LLC*, No. C 07-03983 JSW,
 28 2009 U.S. Dist. LEXIS 57665, *3-4 (N.D. Cal. June 18, 2009) (precluding

1 expert from testifying regarding copyrightability of light fixtures alleged to have
 2 been infringed).

3 The testimony Franklyn has provided thus far falls within the category of
 4 inadmissible and excludable legal opinion testimony. Franklyn's Expert Report,
 5 Rebuttal Reports, and Declaration improperly opines on principles of trademark
 6 law and liability. For example, Franklyn inappropriately makes conclusions of
 7 law as to what constitutes infringing conduct (Docket No. 125-12 (Franklyn
 8 Expert Report) ¶ 14; Docket No. 90-1, Ex. N (Franklyn Declaration) ¶ 43) and
 9 what facts must be shown for a finding of generic-ness (Docket No. 125-12
 10 (Franklyn Expert Report) ¶ 18; Docket No. 90, Ex. N (Franklyn Declaration) ¶¶
 11 51, 53, 57, 58, 69). *See Nationwide Trans. Fin.*, 523 F.3d at 1058 (affirming
 12 exclusion of expert opinion that characterized defendant's conduct as
 13 "wrongful" or "intentional" under the law).

14 Additionally, Franklyn's Rebuttal Reports improperly advance
 15 Glidewell's legal arguments, rather than responding to Keating's expert reports.
 16 (Docket No. 125-14 (Franklyn Rebuttal to Boatright) ¶¶ 3-11, 24-26; Docket
 17 No. 125-13 (Franklyn Rebuttal to Eggleston) ¶¶ 3-18, 20, 22, 28.) *Estate of*
 18 *Brutsche v. City of Federal Way*, 300 Fed. Appx. 552 (9th Cir. 2008) (citing
 19 *Gen. Signal Corp. v. MCI Telecomms. Corp.*, 66 F.3d 1500, 1509-11 (9th Cir.
 20 1995) (rebuttal evidence may be offered to challenge the evidence or theory of
 21 the opponent, but not to establish the case in chief)); *Pinal Creek Group v.*
 22 *Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1044 (D. Ariz. 2005) (granting
 23 motion to exclude several law professors' testimony, noting that expert reports
 24 "read[] more like a legal brief than an expert report"); *In re Rezulin Prods. Liab.*
 25 *Litig.*, 309 F. Supp. 2d 531, 541 (S.D.N.Y. 2004) (experts should not be
 26 permitted to "supplant the role of counsel in making argument at trial").
 27 Accordingly, Franklyn's legal conclusions are not admissible and should be
 28 excluded from trial.

1 **IV. IN THE ALTERNATIVE, THE EVIDENCE INTRODUCED**
 2 **IN FRANKLYN'S REBUTTAL REPORTS AND DECLARATION**
 3 **IS UNTIMELY AND SHOULD BE EXCLUDED**
 4 **PURSUANT TO F.R.C.P. 37(C)(1)**

5 Should the court decline to exclude Franklyn's testimony in its entirety,
 6 Keating also moves to exclude all evidence and argument relating to, or
 7 introduced by, Franklyn's untimely Rebuttal Reports and Declaration.

8 Under F.R.C.P. 26(a)(2) (A), a party must disclose to the other parties the
 9 identity of any expert witness it may use at trial. A party's expert witness
 10 disclosure must be accompanied by a written report prepared by the expert
 11 witness containing, among other things, all the opinions the witness will express
 12 at trial and the basis for those opinions. F.R.C.P. 26(a)(2)(B). Moreover, these
 13 disclosures must be made at the time and in the sequence that the court orders.
 14 F.R.C.P. 26(a)(2)(D). "If a party fails to provide information or identify a
 15 witness as required by Rule 26(a) or (e), the party is not allowed to use that
 16 information or witness to supply evidence on a motion, at a hearing, or at a trial,
 17 unless the failure was substantially justified or is harmless." F.R.C.P. 37(c)(1).⁴

18 Here, Glidewell violated F.R.C.P. 26(a)(2) by failing to provide
 19 Franklyn's Rebuttal Report within the deadline for rebuttal reports. Franklyn's
 20 Rebuttal Reports, and Franklyn's Declaration repeating the information
 21 contained in those Rebuttal Reports, introduced evidence that was not disclosed
 22 during discovery, in Franklyn's Expert Report, or during Franklyn's Deposition.
 23 Thus, pursuant to F.R.C.P. 37(c)(1), the evidence introduced in Franklyn's
 24 Rebuttal Reports and Declaration must be excluded from trial unless Glidewell
 25 can show a "substantial justification" for its violation, or show that its violation

26 ⁴ Because of Glidewell's untimely disclosure of Franklyn's Rebuttal Reports
 27 and Declaration, Keating had no opportunity to depose Franklyn on the
 28 evidence and information provided in those documents. Thus, this untimely
 evidence should also be excluded pursuant to F.R.E. 403 as unfairly prejudicial
 to Keating.

1 was harmless. *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101,
 2 1106 (9th Cir. 2001).

3 Admitting evidence past the discovery dates is a disfavored practice, and
 4 the burden rests entirely on Glidewell to establish that it was substantially
 5 justified in failing to timely serve the Franklyn Rebuttal Reports or that the
 6 failure to timely serve was harmless. *See Wong v. Regents of the Univ. of Cal.*,
 7 410 F.3d 1052, 1062 (9th Cir. 2005) (holding that proponent could not establish
 8 that the failure to produce expert reports in a timely manner was not harmless
 9 where deadlines for disclosing experts and conducting expert discovery had
 10 passed, and the court would have had to reopen discovery and extend the period
 11 for submitting rebuttal reports); *see also Jarritos, Inc. v. Reyes*, 345 Fed. Appx.
 12 215, 217 (9th Cir. 2009) (holding that the district court properly excluded expert
 13 witness reports that were produced after the discovery deadline, even though the
 14 reports were central to the party's case and its exclusion was highly prejudicial
 15 to proponent).

16 Glidewell has not offered any justification for its failure to timely provide
 17 the Franklyn Rebuttal Reports. Glidewell never brought to Keating's attention
 18 that it intended to serve such rebuttal reports, nor provided any extenuating
 19 circumstances justifying a need to delay the filing of the Franklyn Rebuttal
 20 Reports. The only explanation given by Glidewell in its *Ex Parte* Application
 21 (which the court denied) was that Glidewell's prior counsel had not been
 22 diligent. (Docket No. 69, page 1.) Lack of diligence is not a proper excuse for
 23 ignoring the court's scheduling orders. *Wong*, 410 F.3d at 1062; *see also*
 24 *Sanchez v. Dupnik*, 362 F. Appx 679, 681 (9th Cir. 2010) ("The fact that
 25 [plaintiff]'s prior counsel was dilatory in identifying a new expert does not show
 26 substantial justification [under Rule 37]. We cannot say that the district court
 27 abused its discretion in adhering to the deadlines in place.").

28 / / /

1 Furthermore, given that the Franklyn Rebuttal Reports were submitted so
 2 long after the cut-off date and after Franklyn was deposed, the prejudice to
 3 Keating increases significantly. In light of this increased prejudice, the burden
 4 on Glidewell of showing a “substantial justification” should also be increased.
 5 Here, too, Glidewell’s argument that its prior counsel “failed” or was not
 6 diligent, is not sufficient to meet this burden. *Id.*⁵

7 The question is: Whether Glidewell’s belated submissions is harmless? It
 8 is well settled that serving expert reports after the case cut-off dates is
 9 considered not harmless. *E.g., Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d
 10 963, 969 & n. 5 (9th Cir. 2006) (affirming trial court’s refusal to consider an
 11 expert report because plaintiff had failed to comply with the trial court’s
 12 Scheduling Order); *Jarritos*, 345 F. Appx at 217 (“The district court acted
 13 within its discretion in excluding Jarritos’ late-filed expert reports.”). In order
 14 for Glidewell’s untimely reports to be admitted, the court would have to reopen
 15 discovery and extend expert disclosure deadlines. The court expressly denied
 16 Glidewell’s request for such extensions. *See Wong*, 410 F.3d at 1062.
 17 Additionally, and significantly, Keating made its decisions regarding its own
 18 experts and defense strategy based on what Glidewell had provided before the
 19 cut-offs. Accordingly, Glidewell has not met its high burden to justify the
 20 admission of the evidence or argument relating to, or introduced by, the
 21 ///

22 ⁵ Moreover, the Franklyn Rebuttal to Boatright was served in response to the
 23 Defendant’s Expert Lori Boatright’s Rebuttal Report to the Report of David J.
 24 Franklyn (“Def.’s Rebuttal to Franklyn”). Ms. Boatright’s Rebuttal Report was
 25 timely submitted on October 15, 2012. Franklyn’s untimely Rebuttal to
 26 Boatright, is actually a sur-rebuttal. This sur-rebuttal is improper because
 27 Boatright’s Rebuttal to Franklyn did not introduce new evidence for Franklyn to
 28 respond to. *See United States v. McCollum*, 732 F.2d 1419 (9th Cir. 1984)
 (overruled on another point of law); *Brooktree Corp. v. Advanced Micro
 Devices, Inc.*, 757 F. Supp. 1088, 1096 (S.D. Cal. 1990).

1 untimely Franklyn Rebuttal Reports and the Franklyn Declaration. The belated
2 information should be excluded at trial pursuant to F.R.C.P. 37(c)(1).

3 **V. CONCLUSION**

4 For the foregoing reasons, Keating requests an order excluding from trial
5 all testimony from David J. Franklyn, or, in the alternative, an order excluding
6 from trial all evidence or argument relating to, or introduced by, the untimely
7 Franklyn Rebuttal Reports and the Franklyn Declaration.

8 Respectfully submitted,

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